subscribers shall be deemed a small operator if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate.[35] Industry data indicate that all but nine cable operators nationwide are small under this subscriber size standard.[36] We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million,[37] and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

10. *Direct Broadcast Satellite ("DBS") Service.* DBS service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic "dish" antenna at the subscriber's location. DBS, by exception, is now included in the SBA's broad economic census category, "Wired Telecommunications Carriers,"[38] which was developed for small wireline firms. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.[39] Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these firms can be considered small.[40] Currently, only two entities provide DBS service, which requires a great investment of capital for operation: DIRECTV and EchoStar Communications Corporation ("EchoStar") (marketed as the DISH Network).[41] Each currently offers subscription services. DIRECTV[42] and EchoStar[43] each report annual revenues that are in excess of the threshold for a small business. Because DBS service requires significant capital, we believe it is unlikely that a small entity as defined by the SBA would have the financial wherewithal to become a DBS service provider.

11. *Satellite Master Antenna Television (SMATV) Systems, also known as Private Cable Operators (PCOs).* SMATV systems or PCOs are video distribution facilities that use closed transmission paths without using any public right-of-way. They acquire video programming and

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[35] 47 C.F.R. § 76.901(f); *see FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, Public Notice, 16 FCC Rcd 2225 (Cable Services Bureau 2001).

[36] *See* BROADCASTING & CABLE YEARBOOK 2010 at C-2 (2009) (data current as of Dec. 2008).

[37] The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules. *See* 47 C.F.R. § 76.901(f).

[38] *See* 13 C.F.R. § 121.201, 2007 NAICS code 517110. The 2007 NAICS definition of the category of "Wired Telecommunications Carriers" is in paragraph 6, above.

[39] 13 C.F.R. § 121.201, 2007 NAICS code 517110.

[40] *See* http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.

[41] S*ee Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 24 FCC Rcd 542, 580, ¶ 74 (2009) (*"13th Annual Report"*). We note that, in 2007, EchoStar purchased the licenses of Dominion Video Satellite, Inc. ("Dominion") (marketed as Sky Angel). *See* Public Notice, "Policy Branch Information; Actions Taken," Report No. SAT-00474, 22 FCC Rcd 17776 (IB 2007).

[42] As of June 2006, DIRECTV is the largest DBS operator and the second largest MVPD, serving an estimated 16.20% of MVPD subscribers nationwide. *See 13th Annual Report*, 24 FCC Rcd at 687, Table B-3.

[43] As of June 2006, DISH Network is the second largest DBS operator and the third largest MVPD, serving an estimated 13.01% of MVPD subscribers nationwide. *Id.*

distribute it via terrestrial wiring in urban and suburban multiple dwelling units such as apartments and condominiums, and commercial multiple tenant units such as hotels and office buildings. SMATV systems or PCOs are now included in the SBA's broad economic census category, "Wired Telecommunications Carriers,"[44] which was developed for small wireline firms. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.[45] Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or more. Thus, under this category and the associated small business size standard, the majority of these firms can be considered small.[46]

12. *Home Satellite Dish ("HSD") Service.* HSD or the large dish segment of the satellite industry is the original satellite-to-home service offered to consumers, and involves the home reception of signals transmitted by satellites operating generally in the C-band frequency. Unlike DBS, which uses small dishes, HSD antennas are between four and eight feet in diameter and can receive a wide range of unscrambled (free) programming and scrambled programming purchased from program packagers that are licensed to facilitate subscribers' receipt of video programming. Because HSD provides subscription services, HSD falls within the SBA-recognized definition of Wired Telecommunications Carriers.[47] The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees.[48] Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or more. Thus, under this category and the associated small business size standard, the majority of these firms can be considered small.[49]

13. *Broadband Radio Service and Educational Broadband Service.* Broadband Radio Service systems, previously referred to as Multipoint Distribution Service (MDS) and Multichannel Multipoint Distribution Service (MMDS) systems, and "wireless cable," transmit video programming to subscribers and provide two-way high speed data operations using the microwave frequencies of the Broadband Radio Service (BRS) and Educational Broadband Service (EBS) (previously referred to as the Instructional Television Fixed Service (ITFS)).[50] In connection with the 1996 BRS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of no more than $40 million in the previous three calendar years.[51] The BRS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67

[44] 13 C.F.R. § 121.201, 2007 NAICS code 517110.

[45] *See id.*

[46] *See* http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.

[47] 13 C.F.R. § 121.201, 2007 NAICS code 517110.

[48] *See id.*

[49] *See* http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.

[50] *Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, MM Docket No. 94-131, PP Docket No. 93-253, Report and Order, 10 FCC Rcd 9589, 9593, ¶ 7 (1995).

[51] 47 C.F.R. § 21.961(b)(1).

auction winners, 61 met the definition of a small business. BRS also includes licensees of stations authorized prior to the auction. At this time, we estimate that of the 61 small business BRS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent BRS licensees that are considered small entities.[52] After adding the number of small business auction licensees to the number of incumbent licensees not already counted, we find that there are currently approximately 440 BRS licensees that are defined as small businesses under either the SBA or the Commission's rules. In 2009, the Commission conducted Auction 86, the sale of 78 licenses in the BRS areas.[53] The Commission offered three levels of bidding credits: (i) a bidder with attributed average annual gross revenues that exceed $15 million and do not exceed $40 million for the preceding three years (small business) received a 15 percent discount on its winning bid; (ii) a bidder with attributed average annual gross revenues that exceed $3 million and do not exceed $15 million for the preceding three years (very small business) received a 25 percent discount on its winning bid; and (iii) a bidder with attributed average annual gross revenues that do not exceed $3 million for the preceding three years (entrepreneur) received a 35 percent discount on its winning bid.[54] Auction 86 concluded in 2009 with the sale of 61 licenses.[55] Of the ten winning bidders, two bidders that claimed small business status won 4 licenses; one bidder that claimed very small business status won three licenses; and two bidders that claimed entrepreneur status won six licenses.

14. In addition, the SBA's Cable Television Distribution Services small business size standard is applicable to EBS. There are presently 2,032 EBS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in this analysis as small entities.[56] Thus, we estimate that at least 1,932 licensees are small businesses. Since 2007, Cable Television Distribution Services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies."[57] The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees.[58] Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for

[52] 47 U.S.C. § 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standard of 1500 or fewer employees.

[53] *Auction of Broadband Radio Service (BRS) Licenses, Scheduled for October 27, 2009, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 86*, Public Notice, 24 FCC Rcd 8277 (2009).

[54] *Id.* at 8296.

[55] *Auction of Broadband Radio Service Licenses Closes, Winning Bidders Announced for Auction 86, Down Payments Due November 23, 2009, Final Payments Due December 8, 2009, Ten-Day Petition to Deny Period*, Public Notice, 24 FCC Rcd 13572 (2009).

[56] The term "small entity" within SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)–(6). We do not collect annual revenue data on EBS licensees.

[57] U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers," (partial definition), www.census.gov/naics/2007/def/ND517110.HTM#N517110.

[58] 13 C.F.R. § 121.201, 2007 NAICS code 517110.

the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had employment of 1,000 employees or more. Thus, under this category and the associated small business size standard, the majority of these firms can be considered small.[59]

15. *Fixed Microwave Services.* Microwave services include common carrier,[60] private-operational fixed,[61] and broadcast auxiliary radio services.[62] They also include the Local Multipoint Distribution Service (LMDS),[63] the Digital Electronic Message Service (DEMS),[64] and the 24 GHz Service,[65] where licensees can choose between common carrier and non-common carrier status.[66] At present, there are approximately 31,428 common carrier fixed licensees and 79,732 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. There are approximately 120 LMDS licensees, three DEMS licensees, and three 24 GHz licensees. The Commission has not yet defined a small business with respect to microwave services. For purposes of the IRFA, we will use the SBA's definition applicable to Wireless Telecommunications Carriers (except satellite)—*i.e.*, an entity with no more than 1,500 persons.[67] Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.[68] For the category of Wireless Telecommunications Carriers (except Satellite), Census data for 2007, which supersede data contained in the 2002 Census, show that there were 1,383 firms that operated that year.[69] Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small. We note that the number of firms does not necessarily track the number of licensees. We estimate that virtually all of the Fixed Microwave licensees (excluding broadcast auxiliary licensees) would qualify as small entities under the SBA definition.

16. *Open Video Systems.* The open video system ("OVS") framework was established in 1996, and is one of four statutorily recognized options for the provision of video programming services

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[59] *See* http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.

[60] *See* 47 C.F.R. Part 101, Subparts C and I.

[61] *See* 47 C.F.R. Part 101, Subparts C and H.

[62] Auxiliary Microwave Service is governed by Part 74 of Title 47 of the Commission's Rules. *See* 47 C.F.R. Part 74. Available to licensees of broadcast stations and to broadcast and cable network entities, broadcast auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes mobile TV pickups, which relay signals from a remote location back to the studio.

[63] *See* 47 C.F.R. Part 101, Subpart L.

[64] *See* 47 C.F.R. Part 101, Subpart G.

[65] *See id.*

[66] *See* 47 C.F.R. §§ 101.533, 101.1017.

[67] 13 C.F.R. § 121.201, 2007 NAICS code 517210.

[68] *See id.* The now-superseded, pre-2007 C.F.R. citations were 13 C.F.R. § 121.201, NAICS codes 517211 and 517212 (referring to the 2002 NAICS).

[69] U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=700&-ds_name=EC0751SSSZ5&-_lang=en.

by local exchange carriers.[70] The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,[71] OVS falls within the SBA small business size standard covering cable services, which is "Wired Telecommunications Carriers."[72] The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees.[73] Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or more. Thus, under this category and the associated small business size standard, the majority of these firms can be considered small.[74] In addition, we note that the Commission has certified some OVS operators, with some now providing service.[75] Broadband service providers ("BSPs") are currently the only significant holders of OVS certifications or local OVS franchises.[76] The Commission does not have financial or employment information regarding the entities authorized to provide OVS, some of which may not yet be operational. Thus, at least some of the OVS operators may qualify as small entities.

17. *Cable and Other Subscription Programming.* The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in operating studios and facilities for the broadcasting of programs on a subscription or fee basis . . . . These establishments produce programming in their own facilities or acquire programming from external sources. The programming material is usually delivered to a third party, such as cable systems or direct-to-home satellite systems, for transmission to viewers."[77] The SBA has developed a small business size standard for this category, which is: all such firms having $15 million dollars or less in annual revenues.[78] To gauge small business prevalence in the Cable and Other Subscription Programming industries, the Commission relies on data currently available from the U.S. Census for the year 2007. Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 396 firms in this category that operated for the entire year.[79] Of that number, 325 operated with annual revenues of $ 9,999,999 million dollars or less.[80] Seventy-one (71) operated with annual revenues of between $10 million and $100 million or

[70] 47 U.S.C. § 571(a)(3)-(4). *See 13th Annual Report*, 24 FCC Rcd at 606, ¶ 135.

[71] *See* 47 U.S.C. § 573.

[72] U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers"; http://www.census.gov/naics/2007/def/ND517110.HTM#N517110.

[73] 13 C.F.R. § 121.201, 2007 NAICS code 517110.

[74] *See* http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.

[75] A list of OVS certifications may be found at http://www.fcc.gov/mb/ovs/csovscer.html.

[76] *See 13th Annual Report*, 24 FCC Rcd at 606-07, ¶ 135. BSPs are newer firms that are building state-of-the-art, facilities-based networks to provide video, voice, and data services over a single network.

[77] U.S. Census Bureau, 2007 NAICS Definitions, "515210 Cable and Other Subscription Programming"; http://www.census.gov/naics/2007/def/ND515210.HTM#N515210.

[78] 13 C.F.R. § 121.201, 2007 NAICS code 515210.

[79] http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=700&-ds_name=EC0751SSSZ4&-_lang=en

[80] *Id.*

more.[81] Thus, under this category and associated small business size standard, the majority of firms can be considered small.

18. *Small Incumbent Local Exchange Carriers.* We have included small incumbent local exchange carriers in this present RFA analysis. A "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation."[82] The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not "national" in scope.[83] We have therefore included small incumbent local exchange carriers in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

19. *Incumbent Local Exchange Carriers ("LECs").* Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[84] Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had employment of 1,000 employees or more. Thus, under this category and the associated small business size standard, the majority of these firms can be considered small.[85]

20. *Competitive Local Exchange Carriers, Competitive Access Providers (CAPs), "Shared-Tenant Service Providers," and "Other Local Service Providers."* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[86] Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or more. Thus, under this category and the associated small business size standard, the majority of these firms can be considered small.[87] Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, "Shared-Tenant Service Providers," and "Other Local Service Providers" are small entities.

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[81] *Id.*

[82] 15 U.S.C. § 632.

[83] Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of "small-business concern," which the RFA incorporates into its own definition of "small business." *See* 15 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. *See* 13 C.F.R. § 121.102(b).

[84] 13 C.F.R. § 121.201, 2007 NAICS code 517110.

[85] *See* http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.

[86] 13 C.F.R. § 121.201, 2007 NAICS code 517110.

[87] *See* http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.

21. *Television Broadcasting.* The SBA defines a television broadcasting station as a small business if such station has no more than $14.0 million in annual receipts.[88] Business concerns included in this industry are those "primarily engaged in broadcasting images together with sound."[89] The Commission has estimated the number of licensed commercial television stations to be 1,390.[90] According to Commission staff review of the BIA/Kelsey, MAPro Television Database ("BIA") as of April 7, 2010, about 1,015 of an estimated 1,380 commercial television stations[91] (or about 74 percent) have revenues of $14 million or less and, thus, qualify as small entities under the SBA definition. The Commission has estimated the number of licensed noncommercial educational (NCE) television stations to be 391.[92] We note, however, that, in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations[93] must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. The Commission does not compile and otherwise does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities.

22. In addition, an element of the definition of "small business" is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply do not exclude any television station from the definition of a small business on this basis and are therefore over-inclusive to that extent. Also, as noted, an additional element of the definition of "small business" is that the entity must be independently owned and operated. We note that it is difficult at times to assess these criteria in the context of media entities and our estimates of small businesses to which they apply may be over-inclusive to this extent.

23. *Motion Picture and Video Production.* The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in producing, or producing and

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[88] *See* 13 C.F.R. § 121.201, 2007 NAICS Code 515120.

[89] U.S. Census Bureau, 2007 NAICS Definitions, "515120 Television Broadcasting"; http://www.census.gov/naics/2007/def/ND515120.HTM. This category description continues, "These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public. These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studios, from an affiliated network, or from external sources." Separate census categories pertain to businesses primarily engaged in producing programming. *See* Motion Picture and Video Production, NAICS code 512110; Motion Picture and Video Distribution, NAICS Code 512120; Teleproduction and Other Post-Production Services, NAICS Code 512191; and Other Motion Picture and Video Industries, NAICS Code 512199.

[90] *See* News Release, "Broadcast Station Totals as of December 31, 2010," 2011 WL 484756 (dated Feb. 11, 2011) ("*Broadcast Station Totals*"); also available at http://www.fcc.gov/Daily_Releases/Daily_Business/2011/db0211/DOC-304594A1.pdf.

[91] We recognize that this total differs slightly from that contained in *Broadcast Station Totals*, *supra*, note 90; however, we are using BIA's estimate for purposes of this revenue comparison.

[92] *See Broadcast Station Totals*, *supra*, note 90.

[93] "[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has to power to control both." 13 C.F.R. § 121.103(a)(1).

distributing motion pictures, videos, television programs, or television commercials."[94] We note that firms in this category may be engaged in various industries, including cable programming. Specific figures are not available regarding how many of these firms produce and/or distribute programming for cable television. The SBA has developed a small business size standard for this category, which is: all such firms having $29.5 million dollars or less in annual revenues.[95] To gauge small business prevalence in the Motion Picture and Video Production industries, the Commission relies on data currently available from the U.S. Census for the year 2007. Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 9,095 firms in this category that operated for the entire year.[96] Of these, 8995 had annual receipts of $24,999,999 or less, and 100 has annual receipts ranging from not less that $25,000,000 to $100,000,000 or more.[97] Thus, under this category and associated small business size standard, the majority of firms can be considered small.

24. *Motion Picture and Video Distribution.* The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in acquiring distribution rights and distributing film and video productions to motion picture theaters, television networks and stations, and exhibitors."[98] We note that firms in this category may be engaged in various industries, including cable programming. Specific figures are not available regarding how many of these firms produce and/or distribute programming for cable television. The SBA has developed a small business size standard for this category, which is: all such firms having $29.5 million dollars or less in annual revenues.[99] To gauge small business prevalence in the Motion Picture and Video Distribution industries, the Commission relies on data currently available from the U.S. Census for the year 2007. Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 450 firms in this category that operated for the entire year.[100] Of these, 434 had annual receipts of $24,999,999 or less, and 16 had annual receipts ranging from not less that $25,000,000 to $100,000,000 or more.[101] Thus, under this category and associated small business size standard, the majority of firms can be considered small.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

25. Certain proposed rule changes discussed in the *NPRM* would affect reporting, recordkeeping, or other compliance requirements. These proposed changes would primarily impact video programming vendors and MVPDs, and would only apply in the event a program carriage complaint is filed. First, the *NPRM* proposes revised discovery procedures for program carriage complaint

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[94] U.S. Census Bureau, 2007 NAICS Definitions, "51211 Motion Picture and Video Production"; http://www.census.gov/naics/2007/def/NDEF512.HTM#N51211.

[95] 13 C.F.R. § 121.201, 2007 NAICS code 512110.

[96] *See* http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=200&-ds_name=EC0751SSSZ4&-_lang=en

[97] *Id.*

[98] *See* U.S. Census Bureau, 2007 NAICS Definitions, "51212 Motion Picture and Video Distribution"; http://www.census.gov/naics/2007/def/NDEF512.HTM#N51212.

[99] 13 C.F.R. § 121.201, 2007 NAICS code 512120.

[100] http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=200&-ds_name=EC0751SSSZ4&-_lang=en

[101] *Id.*

proceedings in which the Media Bureau rules on the merits of the complaint after discovery.[102] The revised discovery procedures would require parties to a complaint to produce certain documents to the other party within defined time periods.[103] Under the expanded discovery process, a party to a program carriage complaint can request discovery directly from the other party, which that party may oppose, with the obligation to produce the disputed material suspended until the Commission rules on the objection.[104] Under automatic document production, a party to a program carriage complaint would be required to provide certain documents set forth in the Commission's rules to the other party within ten days after the Media Bureau's determination that the complainant has established a *prima facie* case.[105] Second, the *NPRM* proposes adopting procedures allowing for the award of damages in program carriage cases.[106] These procedures would require a program carriage complainant to provide either a detailed computation of damages or a detailed outline of the methodology that would be used to create a computation of damages.[107] To the extent the Commission approves a damages computation methodology, the rules would require the parties to file with the Commission a statement regarding their efforts to agree upon a final amount of damages pursuant to the approved methodology.[108] The *NPRM* proposes similar procedures for the application of new rates, terms, and conditions as of the expiration date of the previous contract in cases where the Media Bureau issues a standstill order in a program carriage complaint proceeding.[109] Third, the *NPRM* proposes to adopt a rule providing that the Media Bureau or an ALJ may order parties to a program carriage complaint to submit their best "final offer" for the rates, terms, and conditions for the programming at issue in a complaint to assist in crafting a remedy.[110] Fourth, the *NPRM* proposes to codify a requirement that the defendant MVPD in a program carriage complaint proceeding must make an evidentiary showing to the Media Bureau or an ALJ as to whether a mandatory carriage remedy would result in deletion of other programming on the MVPD's system.[111] Fifth, the *NPRM* proposes to adopt a rule prohibiting an MVPD from retaliating against a video programming vendor for filing a program carriage complaint.[112] If adopted, this rule would enable a video programming vendor to file a program carriage complaint alleging retaliation, and would require the defendant MVPD to defend its actions. Sixth, the *NPRM* proposes to adopt a rule requiring a vertically integrated MVPD to negotiate in good faith with an unaffiliated programming video programming vendor with respect to video programming that is similarly situated to video programming affiliated with the MVPD.[113] If adopted, this rule would enable a video programming vendor to file a program carriage complaint alleging that a vertically integrated MVPD failed to negotiate in good faith, and would require the defendant MVPD to defend its actions. In addition, the rule would list objective good faith

[102] *See NPRM* at ¶¶ 41-49.

[103] *See NPRM* at ¶¶ 43-44.

[104] *See NPRM* at ¶ 42.

[105] *See NPRM* at ¶ 44.

[106] *See NPRM* at ¶¶ 51-52.

[107] *See NPRM* at ¶ 52.

[108] *See NPRM* at ¶ 52.

[109] *See NPRM* at ¶ 53.

[110] *See NPRM* at ¶¶ 54-55.

[111] *See NPRM* at ¶ 58.

[112] *See NPRM* at ¶¶ 60-67.

[113] *See NPRM* at ¶¶ 68-71.

negotiation standards, the violation of which would be considered a *per se* violation of the good faith negotiation obligation.[114] Seventh, the *NPRM* proposes to clarify that the program carriage discrimination provision precludes a vertically integrated MVPD from discriminating on the basis of a programming vendor's lack of affiliation with another MVPD.[115] If adopted, this rule would enable a video programming vendor to file a program carriage complaint alleging that a vertically integrated MVPD discriminated on the basis of a programming vendor's lack of affiliation with another MVPD, and would require the defendant MVPD to defend its actions.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

26. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[116]

27. As discussed in the *NPRM*, our goal in this proceeding is to further improve our procedures for addressing program carriage complaints and to advance the goals of the program carriage statute. The specific changes on which we seek comment, set forth in Paragraph 3 above, are intended to achieve these goals. By improving and clarifying the Commission's procedures for addressing program carriage complaints, the proposals would benefit both video programming vendors and MVPDs, including those that are smaller entities, as well as MVPD subscribers. Thus, the proposed rules would benefit smaller entities as well as larger entities. For this reason, an analysis of alternatives to the proposed rules is unnecessary. Further, we note that in the discussion of whether to require MVPDs to negotiate in good faith with unaffiliated video programming vendors[117] and whether to clarify that the discrimination provision precludes an MVPD from discriminating on the basis of a programming vendor's lack of affiliation with another MVPD, [118] the Commission in the *NPRM* specifically proposes to apply these rules to only vertically integrated MVPDs. Because small entities are unlikely to be vertically integrated MVPDs, this proposed limitation would provide particular benefit to small entities.

28. We invite comment on whether there are any alternatives we should consider that would minimize any adverse impact on small businesses, but which maintain the benefits of our proposals.

F. Federal Rules that May Duplicate, Overlap, or Conflict With the Proposed Rule

29. None.

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[114] *See NPRM* at ¶ 71.

[115] *See NPRM* at ¶¶ 72-77.

[116] 5 U.S.C. § 603(c)(1)-(c)(4)

[117] *See NPRM* at ¶ 69.

[118] *See NPRM* at ¶ 72.

STATEMENT OF
COMMISSIONER MICHAEL J. COPPS

Re: *Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage; Revision of the Commission's Program Carriage Rules, Second Report and Order in MB Docket No. 07-42 and Notice of Proposed Rulemaking in MB Docket No. 11-131*

The objective of our program carriage rules remains the same as it was in 1993 when the Commission enacted the initial rules. While the telecommunications landscape has dramatically changed in that time, the ongoing need is to provide a venue for the airing of grievances concerning discrimination and to expect fair and equitable outcomes to disputes.

Video distributors are now more likely to be producers themselves, often with far greater leverage and new incentives to favor their own content over that of independent producers. Modernizing these rules is essential to ensure that consumers have the ability to view a variety of diverse programming at the lowest possible cost and hopefully to foster more independent production.

I am pleased that we are taking steps helpful to the accomplishment of the statutory goals of competition and consumer protection. These revised rules will improve and clarify the program carriage complaint procedure by setting deadlines for FCC action while still allowing the parties adequate time to respond fully. These deadlines are important to ensure we continue to meet Congress' mandate of "expedited review" and to reduce unpredictable delays in resolving these complaints. Furthermore, in response to programming vendors' concerns of retaliatory action by an MVPD against a complainant, we have clarified our standstill procedure.

As we prepare for implementation of these new rules—and quite possibly an increased caseload at the FCC—we must also address a possible shortfall in the number of ALJs to hear and resolve these disputes. I believe this order provides the first step toward a resolution of that issue.

I look forward to hearing meaningful public discourse from all the interested stakeholders as we clarify and expedite Commission procedure to enhance the effectiveness of our program carriage rules.

STATEMENT OF
COMMISSIONER ROBERT M. McDOWELL
APPROVING IN PART, DISSENTING IN PART

Re: *Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage; Revision of the Commission's Program Carriage Rules, Second Report and Order in MB Docket No. 07-42 and Notice of Proposed Rulemaking in MB Docket No. 11-131*

Today, we take steps to improve our procedures for handling program carriage complaints. By setting forth the requirements to establish a *prima facie* case, along with timelines for filings and decisions, we increase the likelihood that frivolous complaints will be summarily dismissed and legitimate cases will be investigated expeditiously as mandated by Congress.[1] I support these actions.

Regrettably, the majority has adopted rules requiring multichannel video programming distributors ("MVPDs") to continue to carry programming on pre-existing terms and conditions, also known as "standstill" arrangements. Pursuant to these rules, an agreement will be extended until a program carriage dispute is resolved. The Commission, however, did not provide adequate notice and opportunity for comment under the Administrative Procedure Act ("APA"). An analysis of a possible standstill framework would benefit significantly from further debate. Accordingly, I respectfully dissent from this portion of the *Order*.

The APA requires that a notice contain "either the terms or substance of the proposed rule or a description of the subjects and issues involved."[2] Here, as evidence of notice, the majority points to one sentence in a 2007 notice requesting comment on whether to adopt rules "to protect programmers from potential retaliation if they file a complaint."[3] The majority asserts that the standstill rules are a "logical outgrowth" of this proposal. I disagree.

In interpreting the "logical outgrowth" standard, courts have stated that "notice must be sufficient to fairly apprise interested parties of the issues involved, but it need not specify every precise proposal which [the agency] may ultimately adopt as a rule."[4] On the other hand, notice can also be "too general to be adequate."[5] Without reasonable notice regarding the specific ideas and alternatives being considered,

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[1] 47 U.S.C. § 536(a)(4).

[2] 5 U.S.C. § 553(b)(3).

[3] Leased Commercial Access and Development of Competition; Diversity in Video Programming Distribution and Carriage, MB Docket No. 07-42, *Notice of Proposed Rulemaking*, 22 FCC Rcd 11222, 11227 ¶ 16 (2007).

[4] *See* Nuvio Corp. v. FCC, 473 F.3d 302, 310 (D.C.Cir. 2006) (citing Action for Children's Television v. FCC, 564 F. 2d 458, 470 (D.C.Cir. 1977)). Courts have asserted that fair notice to the affected parties is of paramount importance. *See* Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 174 (2007) ("The Courts of Appeals have generally interpreted [the APA notice requirement] to mean that the final rule the agency adopts must be 'a logical outgrowth of the rule proposed. The object, in short, is one of fair notice.'" (internal citations omitted)); *see also* Council Tree Commc'ns, Inc. v. FCC, 619 F. 3d 235, 250 (3d Cir. 2010) (citing Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin., 407 F.3d 1250, 1259 (D.C.Cir. 2005)).

[5] Owner-Operator Indep. Drivers Ass'n, Inc. v. Fed. Motor Carrier Safety Admin., 494 F.3d 188, 209 (D.C.Cir. 2007); Small Refinery Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 549 (D.C.Cir. 1983). *See also* Prometheus Radio Project v. FCC, No. 08-3078, slip op. at 30 (3d Cir. July 7, 2011) (stating that the language in the NPRM was "simply too general and open-ended to have fairly apprised the public.").

"interested parties will not know what to comment on, and notice will not lead to better-informed agency decisionmaking."[6]

Although it may be difficult to identify precisely how much notice is sufficient under the "logical outgrowth" standard, the relationship between retaliation and standstill arrangements, which is tenuous at best, makes the rule adopted today vulnerable to a court remand.[7] In this instance, standstill arrangements were not discussed in the 2007 notice, so interested parties were not aware that comments should be filed on the subject during the notice-and-comment period.[8] In fact, the idea of a standstill provision was not raised by any parties submitting initial comments. Instead, the matter was advanced after the close of the comment period.[9] Thus, all interested parties may not have had an opportunity to opine on the inclusion of a standstill arrangement as part of the program carriage complaint process.[10]

I am also disappointed that the majority has failed to consider the recent media ownership decision, *Prometheus II*, in which the U.S. Court of Appeals for the Third Circuit held that two sentences in a notice of proposed rulemaking that indicated the Commission's intention to revise the cross-ownership rule was too general and open-ended to have fairly notified the public of the new approach to cross ownership.[11] Here, the majority adopts rules based on far less specificity provided to the public for its analysis and comment. The 2007 notice does not explicitly, or even implicitly, contemplate standstill arrangements. Furthermore, it does not suggest the proposed extension of program carriage agreements or the continuation of programming during the complaint process, even in the most general of terms.

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[6] *Small Refinery Lead Phase-Down Task Force*, 705 F.2d at 549; United Church Bd. for World Ministries v. SEC, 617 F. Supp. 837, 839 (D.D.C. 1985). *See also* Home Box Office, Inc. v. FCC, 567 F.2d 9, 35-36 (D.C.Cir. 1977), *cert. denied*, 434 U.S. 829 (1977) ("[A]n agency proposing informal rulemaking has an obligation to make its views known to the public in a concrete and focused form so as to make criticism or formulation of alternatives possible.").

[7] It is arguable, under the interpretation of some courts, that the "logical outgrowth" doctrine would not even apply in this instance, because the notice did not suggest the possibility of standstill arrangements and "[s]omething is not a logical outgrowth of nothing." *Council Tree Commc'ns*, 619 F.3d at 250; *Int'l Union, United Mine Workers of Am.*, 407 F.3d at 1259; Kooritzky v. Wright, 17 F.3d 1509, 1513 (D.C.Cir. 1994).

[8] *See, e.g.,* CSX Transp., Inc. v. Surface Transp. Bd., 584 F.3d 1076, 1079-80 (D.C. Cir. 2009); Ne. Md. Waste Disposal Auth. v. EPA, 358 F.3d 936, 952 (D.C.Cir. 2004).

[9] *See Order* at 19 n.101 (citing *ex parte* letters discussing standstill arrangements with the earliest being filed in November 2007); Media Bureau Announces Comment and Reply Comment Dates for the Notice of Proposed Rule Making Regarding Leased Commercial Access and the Development of Competition and Diversity in Video Programming Distribution and Carriage, MB Docket No. 07-42, *Public Notice*, 22 FCC Rcd 13190 (2007) (announcing the deadlines for comments and reply comments as September 4, 2007 and September 21, 2007, respectively); Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage, MB Docket No. 07-42, *Order Granting Extension of Time for Filing Comments and Reply Comments*, 22 FCC Rcd 16103 (2007) (extending the deadlines for comments and reply comments to September 11, 2007 and October 12, 2007, respectively).

[10] *See* Nat'l Exch. Carrier Ass'n, Inc. v. FCC, 253 F.3d 1, 4 (D.C.Cir. 2001) (stating that "the logical outgrowth test normally is applied to consider whether a new round of notice and comment would provide the first opportunity for interested parties to offer comments that could persuade the agency to modify its rule."); *Small Refinery Lead Phase-Down Task Force*, 705 F.2d at 549 (stating that an agency "must *itself* provide notice of a regulatory proposal [and], having failed to do so, it cannot bootstrap notice from a comment.").

[11] *Prometheus Radio Project*, No. 08-3078, slip op. at 30.

Furthermore, I am not convinced by the majority's argument that the regulations codifying standstill arrangements are solely rules of agency procedure for which no notice is required under the APA.[12] These rules confer substantive rights by authorizing the Media Bureau, upon the filing of a petition by a complainant, to grant a temporary standstill of the price, terms, and other conditions of the existing contract. A rule that extends a contractual arrangement and determines the amount of compensation parties will receive after the program carriage dispute is resolved is outside the scope of Commission procedure.[13]

Moreover, I am not persuaded by the majority's position that these rules are procedural based on our previous use of standstills as a form of injunctive relief under section 4(i) of the Communications Act.[14] Although I recognize that standstills in program carriage disputes have been implemented on a case-by-case basis, these arrangements have not been reviewed by the Commission or a court for consistency with Section 616 of the Communications Act, which allows for penalties and remedies, such as ordering program carriage, only upon the finding of a violation, or Section 624, which prohibits the Commission from imposing requirements on the provision or content of cable services beyond those provided by statute.[15] While the majority asserts that there are parallels to the program access regime where Section 4(i) was relied upon in adopting standstill rules, there are significant statutory and regulatory differences between program access – where a programmer is under an obligation not to withhold the network from the MVPD[16] – and program carriage – where the carriage of programming is

[12] 5 U.S.C § 553(b)(A). The cases cited by the majority state that actions, such as application freezes, and rules regarding the filing and processing of applications and amendments are agency procedure and practice. *See Order* at 27-28 n.149. Here, we are not only setting forth procedural rules, such as what petition to file and when, but also taking actions that "alter the rights or interests of the parties." *See, e.g.,* James V. Hurson Assocs, Inc. v. Glickman, 229 F.3d 277, 280 (D.C.Cir. 2000); JEM Broadcasting Co., Inc. v. FCC, 22 F.3d 320, 326 (D.C.Cir. 1994).

[13] *See, e.g.,* Sprint Corp. v. FCC, 315 F.3d 369, 375 (D.C.Cir. 2003) (holding that rule changes regarding payment obligations require notice under the APA); Am. Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1045 (D.C.Cir. 1987) ("Substantive rules are ones which 'grant rights, impose obligations, or produce other significant effects on private interests' or which 'effect a change in existing law or policy.'"). "[T]he APA's procedural rule exception is to be construed very narrowly, and it does not apply where the agency 'encodes a substantive value judgment.'" *Reeder v. FCC*, 865 F.2d 1298, 1305 (D.C.Cir. 1989) (citing *Am. Hosp. Ass'n*, 834 F.2d at 1047).

[14] 47 U.S.C. § 154(i) ("The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.").

[15] 47 U.S.C. § 536(a)(5) (providing for "appropriate penalties and remedies for violations of [regulations governing program carriage agreements], including carriage"); 47 U.S.C. § 544(f)(1) (prohibiting any Federal agency, State, or franchising authority from "impos[ing] requirements regarding the provision or content of cable services, except as expressly provided in this subchapter."); 47 C.F.R. 76.1302(g)(1) ("*Upon completion of* [a program carriage] *proceeding*, the Commission shall order appropriate remedies, including, if necessary, mandatory carriage of a video programming vendor's programming on defendant's video distribution system.") (emphasis added); Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage, MM Docket No. 92-265, *Notice of Proposed Rule Making*, 8 FCC Rcd. 194, 206 ¶ 58 (seeking comment about implementing Section 616(a)(5) of the Cable Act of 1992, including what procedures should be established for mandatory carriage and how long should such carriage last). *Compare* United States v. Sw. Cable Co., 392 U.S. 157, 181 (1968) (finding that the FCC, in the absence of a statue, did not exceed or abuse its authority under the Communications Act by regulating the community antenna television industry under Section 4(i)), *with* Am. Tel. & Tel. Co. v. FCC, 487 F.2d 865, 875-76 (2d Cir. 1973) (holding that Section 4(i) cannot be used to circumvent "statutorily prescribed procedures with consequent frustration of the statutory purpose.").

[16] *Compare* 47 U.S.C. § 536(a)(3), *and* 47 C.F.R. § 76.1301(c), *with* 47 U.S.C. § 548(c)(2)(B), *and* 47 C.F.R. § 76.1002(b) (showing that the program carriage rules make discrimination unlawful only insofar as it is "on the basis

(continued....)

not assured and the statute and rules explicitly state that carriage is a remedy that can only be imposed upon a finding of a violation of the rules.[17] Ironically, despite the alleged similarities between program access and program carriage frameworks raised by the majority, we determined that specific comment regarding standstill arrangements and procedures was necessary only in the program access proceeding.[18]

The majority's insistence in keeping the standstill provisions in the *Order* is even more perplexing when today's *Order* is accompanied by a *Notice* seeking comment on possible revisions to the Commission's program carriage rules. Curiously, the rules adopting the standstill arrangements appear in the *Order*, but we then seek comment on several aspects of their actual implementation in the *Notice*.[19] With an available vehicle at our disposal, clarity and transparency would be served, with limited delay, by seeking comment on the entirety of the standstill rules and procedures, as opposed to the current approach of dividing the matter between the *Order* and *Notice*.[20]

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of affiliation," whereas the program access rules make discrimination unlawful across the board. Further, the program carriage rules prohibit MVPDs from discriminating in the "*selection*, terms or conditions of carriage", whereas the program access rules prohibit discrimination in the "prices, terms or conditions" of sale, making it clear that the carriage of the particular network is presumptive in the program access context but not in the program carriage context (emphasis added)).

[17] *Compare* 47 U.S.C. § 548(e)(1) ("Upon completion of [a program access] adjudicatory proceeding, the Commission shall have the power to order appropriate remedies, including, if necessary, the power to establish prices, terms, and conditions of sale of programming to the aggrieved multichannel video programming distributor"), *and* 47 C.F.R. 76.1003(h)(1) ("Upon completion of [a program access] adjudicatory proceeding, the Commission shall order appropriate remedies, including, if necessary, the imposition of damages, and/or the establishment of prices, terms, and conditions for the sale of programming to the aggrieved multichannel video programming distributor."), *with* 47 U.S.C. § 536(a)(5) (stating explicitly that remedies, including *carriage*, can be ordered upon the finding of a violation or the program carriage rules), *and* 47 C.F.R. 76.1302(g)(1) (stating that *mandatory carriage* can be ordered upon completion of a program carriage proceeding).

[18] *See* Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition; Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements, MB Docket Nos. 07-29 and 07-198, *Report and Order and Notice of Proposed Rulemaking*, 22 FCC Rcd 17791, 17868-70 ¶¶ 135-137 (2007). We also requested comment regarding the Commission's authority provide for mandatory interim carriage during retransmission consent disputes. *See* Amendment of the Commission's Rules Related to Retransmission Consent, MB Docket No. 10-71, *Notice of Proposed Rulemaking*, 26 FCC Rcd 2718, 2727-29 ¶¶ 18-19.

[19] For example, the right to seek a standstill arrangement for all program carriage complaints is adopted in the *Order*, but we then seek comment on whether there are circumstances in which the Commission's authority to issue temporary standstills is statutorily or otherwise limited. Similarly, the majority reasons that we have provided ample notice for implementing the standstill rules based on comment as to whether we should adopt retaliation rules, but, curiously, we seek comment in the *Notice* regarding the extent of our authority to adopt any anti-retaliation provisions. Furthermore, the *Order* adopts rules to determine how the parties will be compensated (the "true up") after resolution of the program carriage complaint. However, we seek comment regarding how the true up will be determined in more complex program carriage disputes, such as when the programming is discontinued or the programming tier is challenged. Thus, certain standstill arrangements may be implemented while we are still considering the best methodology for making the parties whole after the complaint process concludes making the adopted standstill regime almost literally "half baked." The Commission is capable of providing a much better work product than this.

[20] Moreover, as a policy matter, I am concerned about the unintended consequences of these standstill rules. For instance, will standstill arrangements, generally, and the requirement to submit a petition for a standstill 30 days before expiration of a programming agreement negatively affect the negotiation process by prematurely ending the (continued....)

As we move ahead, I look forward to engaging with my colleagues and interested parties on the myriad program carriage issues, and I thank the Media Bureau for its work on this matter.

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discussions between parties? Could these rules enhance the bargaining power of vendors with the most popular programming resulting in price increases that will be passed along to consumers? What is the appropriate standard that the complainant has to meet to obtain a government-mandated extension of the terms and conditions of a privately-negotiated contract? Will MVPDs be reluctant to add new, unproven programming to their packages knowing that existing carriage agreements could be extended if they try to renegotiate terms or discontinue programming, even if it is not popular with subscribers? What are the First Amendment implications of implementing standstill arrangements in program carriage disputes? These important questions, along with whether we have statutory authority to implement standstills, could have been illuminated by requesting further comment. However, I am encouraged to see that the majority recognizes that standstill relief is an "extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief" and that the Media Bureau will consider, when determining whether to grant a standstill, the First Amendment rights of the MVPD, whether irreparable harm has been established, and the circumstantial nature of the evidence in program carriage complaints. *See Order* at 22 n.110 (citing Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7, 21 (2008)).

STATEMENT OF COMMISSIONER MIGNON L. CLYBURN

Re: *Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage; Revision of the Commission's Program Carriage Rules, Second Report and Order in MB Docket No. 07-42 and Notice of Proposed Rulemaking in MB Docket No. 11-131*

I am pleased that the Commission is moving forward with improvements to our program carriage rules. We have heard, from Members of Congress and independent programmers, that clarity is needed for a more transparent process, and I hope that the issues we raise in our NPRM and the decisions we reach in our Order are productive steps in that direction.

Our complaint process has been called slow, impractical, and unfair, and the deadlines we establish for the FCC's Media Bureau and Administrative Law Judges when acting on program carriage complaints will offer a greater element of predictability to programmers and operators awaiting a decision. Further, in solidifying what a complaining party must demonstrate when claiming a carriage violation has occurred, the Commission is seeking to make our evidentiary process clearer and more cogent.

I look forward to the feedback that will result from the language in our NPRM, as the issues we raise regarding potential damages, retaliation, and the timing for the filing of a program carriage complaint are of paramount importance in laying out a roadmap for independent programmers and their expectations via our framework. Greater certainty and broad clarification has been needed for some time, and I am glad that we are on our way to providing it.